

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

JIM BASS HOLDEN,

Petitioner,

v.

WARDEN DWIGHT NEVINS, et al.,

Respondents.

Case No. 2:13-cv-00668-JCM-EJY

ORDER

I. Introduction

This is a habeas corpus action under 28 U.S.C. § 2254. Currently before the court are the second amended petition of Jim Bass Holden ("Holden") (ECF No. 88), respondents' motion to dismiss (ECF No. 90), Holden's opposition (ECF No. 93), and respondents' reply (ECF No. 96). The court finds that multiple grounds in the second amended petition are untimely and unexhausted, one ground is unexhausted, and one ground is untimely, unexhausted, and possibly not addressable in federal habeas corpus. The court thus grants the motion to dismiss.

II. Procedural Background

After a jury trial in state district court, Holden was convicted of one count of murder with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, one count of conspiracy to commit murder, and two counts of first-degree kidnaping with the use of a

1 deadly weapon. ECF No. 47-32. Holden appealed, and the Nevada Supreme Court affirmed on
2 March 28, 2008. ECF No. 41-1 at 93.

3 Holden filed a post-conviction habeas corpus petition on April 17, 2009. ECF No. 41-1 at
4 29. The state district court denied the petition. ECF No. 41 at 8. Holden appealed. The Nevada
5 Supreme Court affirmed in part, reversed in part, and remanded for an evidentiary hearing on
6 Holden's claim that trial counsel provided ineffective assistance during plea negotiations. ECF
7 No. 45 at 152. After an evidentiary hearing, the state district court denied that claim. ECF No.
8 45-1 at 58-65. Holden appealed, and the Nevada Supreme Court affirmed on July 23, 2014. ECF
9 No. 45-1 at 191. Remittitur issued on August 20, 2014. ECF No. 93-3 at 3.

10 On April 14, 2013, while the state post-conviction proceedings were pending, Holden
11 mailed his proper-person initial federal habeas corpus petition under 28 U.S.C. § 2254 to this
12 court. ECF No. 4. Holden filed a counseled first amended petition on May 9, 2016. ECF No. 39.
13 Holden filed a counseled second amended petition, which is the operative petition, on October 21,
14 2019. ECF No. 88.

15 **III. Legal Standard**

16 **A. Timeliness**

17 A person convicted in state court has one year from the finality of the judgment of
18 conviction to file a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. 28 U.S.C.
19 § 2244(d)(1)(A). If the judgment is appealed, then it becomes final when the Supreme Court of
20 the United States denies a petition for a writ of certiorari or when the time to petition for a writ of
21 certiorari expires. Jimenez v. Quarterman, 555 U.S. 113, 119-20 (2009). See also Sup. Ct. R.
22 13(1).

23 Any time spent pursuing a properly filed application for state post-conviction review or
24 other collateral review does not count toward this one-year limitation period. 28 U.S.C.
25 § 2244(d)(2). The period of limitation resumes when the post-conviction judgment becomes final
26 upon issuance of the remittitur. Jefferson v. Budge, 419 F.3d 1013, 1015 n.2 (9th Cir. 2005). A
27 prior federal habeas corpus petition does not toll the period of limitation. Duncan v. Walker, 533
28 U.S. 167, 181-82 (2001).

1 The petitioner effectively files a federal petition when he delivers it to prison officials to
2 be forwarded to the clerk of the court. Rule 3(d), Rules Governing Section 2254 Cases in the
3 United States District Courts.

4 If the petitioner files an amended federal petition after expiration of the one-year period,
5 then, to be timely, the grounds in the untimely amended petition will need to relate back to
6 grounds in an earlier, timely petition. An amended habeas corpus petition "does not relate back
7 (and thereby escape [28 U.S.C. § 2244(d)(1)'s] one-year time limit) when it asserts a new ground
8 for relief supported by facts that differ in both time and type from those the original pleading set
9 forth." Mayle v. Felix, 545 U.S. 644, 650 (2005). Relation back is allowed "[s]o long as the
10 original and amended petitions state claims that are tied to a common core of operative facts . . ."
11 Id. at 664.

12 The Nevada Supreme Court decided Holden's direct appeal on March 28, 2008. Under
13 § 2244(d)(1)(A), the judgment of conviction became final on June 26, 2008. Between that date
14 and the filing of the state post-conviction habeas corpus petition on April 17, 2009, two hundred
15 ninety-four (294) days passed. The one-year period was tolled while the state post-conviction
16 petition was pending. 28 U.S.C. § 2244(d)(2). The Nevada Supreme Court decided the final
17 appeal on July 23, 2014, and remittitur issued August 20, 2014. The one-year period resumed the
18 next day. The one-year period expired at the end of October 30, 2014.

19 Holden mailed his initial petition (ECF No. 1) to the court on April 14, 2013, while his
20 state post-conviction proceedings were pending. It is timely. Holden filed his first amended
21 petition (ECF No. 39) on May 9, 2016, and he filed his second amended petition (ECF No. 88) on
22 October 21, 2019, both after expiration of the one-year period. For grounds in the second
23 amended petition to be considered timely, they will need to relate back to the timely filed initial
24 petition.

25 **B. Exhaustion**

26 Before a federal court may consider a petition for a writ of habeas corpus, the petitioner
27 must exhaust the remedies available in state court. 28 U.S.C. § 2254(b). To exhaust a ground for
28 relief, a petitioner must fairly present that ground to the state's highest court, describing the

operative facts and legal theory, and give that court the opportunity to address and resolve the ground. See Duncan v. Henry, 513 U.S. 364, 365 (1995) (per curiam); Anderson v. Harless, 459 U.S. 4, 6 (1982).

IV. Discussion

Respondents argue that grounds 1, 2(B), and 12 are untimely and unexhausted. Respondents also argue that ground 2(D) is unexhausted. Finally, respondents argue that ground 11 is not addressable in federal habeas corpus, untimely, and unexhausted.

A. Ground 1

Ground 1 is a claim that the prosecution violated Holden's Sixth Amendment right to counsel under Massiah v. United States, 377 U.S. 201 (1964). Holden alleges that he was in jail on other charges, not yet having been charged with the crimes at issue in this action, when a government informant obtained his journal and turned it over to the prosecution, leading to the charges at issue in this action.

1. Ground 1 is untimely

Respondents argue that ground 1 does not relate back to any claim in the initial petition. Holden counters that ground 1 relates back to grounds 7 and 9 of the initial petition. Ground 7 of the initial petition was a claim that the state court erred by admitting evidence of Holden's use of methamphetamine. ECF No. 1 at 15. Ground 9 of the initial petition states only that it is incorporating ground 1 of the state post-conviction petition, and it refers to attached documents. ECF No. 1 at 19. However, Holden did not attach any documents to the initial petition, and thus ground 9 refers to nothing. Nothing in either of those grounds mentions Holden's journal. A claim of ineffective assistance of counsel does not relate back to an timely claim of ineffective assistance of counsel based on entirely different facts. Schneider v. McDaniel, 674 F.3d 1144, 1151-52 (9th Cir. 2012). Ground 1 of the second amended petition does not share a common core of operative fact with ground 7 or ground 9 of the initial petition.

2. Ground 1 is not exhausted

Respondents are correct that Holden did not present a Massiah claim to the Nevada Supreme Court. Holden argues, "Petitioner Holden argued extensively on direct appeal and writ

1 of habeas corpus proceedings in state court that the admission of the journal entries obtained by
 2 informant Steven Hall violated his constitutional right to due process." ECF No. 93 at 10
 3 (emphasis added). On direct appeal, Holden argued that the admission of his journal entries was
 4 a violation of the Due Process Clause of the Fourteenth Amendment because those entries
 5 contained evidence of other criminal conduct not charged in this particular case and because those
 6 entries contained inadmissible character evidence. ECF No. 93-4 at 24-31. A violation of the
 7 Due Process Clause of the Fourteenth Amendment is a different legal theory than a violation of
 8 Holden's right to counsel under the Sixth Amendment. In the appeal from the denial of the post-
 9 conviction petition, Holden argued that trial counsel provided ineffective assistance because, in
 10 the opening statement, trial counsel stated that Steven Hall forced Holden to write journal entries.
 11 ECF No. 93-5 at 39-40. The claim that petitioner presented in his state post-conviction appeal
 12 differs in both legal theory and facts from the claim that petitioner presents now in ground 1.
 13 Because Holden did not present to the state courts the claim that the prosecution violated his
 14 Sixth Amendment right to counsel by obtaining the journal, ground 1 is not exhausted.

15 **B. Ground 2(B)**

16 Ground 2(B) is a claim that trial counsel provided ineffective assistance by not having
 17 Holden testify at trial. Holden's defense was that he acted in self-defense, and he argues that his
 18 own testimony was the best way of convincing the jury. Respondents argue that ground 2(B) is
 19 both untimely and unexhausted. Holden does not argue to the contrary and thus consents to the
 20 granting of this part of the motion. LR 7-2(d).

21 **1. Ground 2(B) is untimely**

22 Holden did allege multiple claims of ineffective assistance of counsel in the initial
 23 petition, but none of them concerned the decision that Holden would not testify. Additionally, no
 24 other ground in the amended petition concerned the decision not to testify. The core facts of
 25 ground 2(B) thus are different from the core facts alleged in the initial petition. See Schneider,
 26 674 F.3d at 1151-52. Ground 2(B) does not relate back to the initial petition, and it is untimely.

1 **2. Ground 2(B) is unexhausted**

2 Holden did not raise this claim either in his direct appeal or in his post-conviction habeas
3 corpus appeal. See ECF No. 93-4, 93-5. Although the post-conviction appeal brief contained
4 multiple claims of ineffective assistance of counsel, none of them concerned the decision not to
5 testify. Those facts are not related to any exhausted claim of ineffective assistance of counsel,
6 and thus Ground 2(B) is unexhausted. See Moorman v. Schriro, 426 F.3d 1044, 1056 (9th Cir.
7 2005).

8 **C. Ground 2(D) is unexhausted**

9 Ground 2(D) is a claim that trial counsel provided ineffective assistance because counsel
10 did not have a knife tested for Holden's DNA, which would have supported Holden's defense that
11 he acted in self-defense. Respondents note correctly that Holden presented no such claim in his
12 post-conviction habeas corpus appeal. See ECF No. 93-5. Holden argues, "Petitioner Holden's
13 brief before the Nevada Supreme Court No. 58143 (writ of habeas corpus) contained ample
14 discussion as to trial counsel's general ineffectiveness for lack of pre-trial investigation. Ground
15 Two(D) is exhausted." ECF No. 93 at 11. That is incorrect. Although the post-conviction appeal
16 brief contained multiple claims of ineffective assistance of trial counsel, none of them alleged the
17 operative facts that Holden alleges in ground 2(D), that trial counsel failed to have a knife tested
18 for Holden's DNA. The facts are not related to any exhausted claim of ineffective assistance of
19 counsel, and thus ground 2(D) is unexhausted. See Moorman, 426 F.3d at 1056.

20 **D. Ground 11**

21 Ground 11 is titled, "Petitioner was entitled to an evidentiary hearing." The body of the
22 ground alleges that trial counsel provided ineffective assistance by not having Holden testify that
23 he had acted in self-defense; i.e., the substance of ground 11 seems to duplicate ground 2(B).

24 **1. Ground 11 is not addressable**

25 If ground 11 is a claim that the state district court should have held an evidentiary hearing
26 on the claim that trial counsel provided ineffective assistance by not having Holden testify, then
27 Holden is claiming an error in the state post-conviction proceedings. Such an error is not
28 addressable in federal habeas corpus. Franzen v. Brinkman, 877 F.2d 26, 26 (9th Cir. 1989).

2. Ground 11 is untimely

If ground 11 is a claim that trial counsel provided ineffective assistance by not having Holden testify, then the timeliness and exhaustion analyses are the same as with ground 2(B). The initial petition does not contain any facts about the defense that Holden acted in self-defense. Although the initial petition does contain other grounds of ineffective assistance of counsel, they rely on different operative facts. Ground 11 does not share a common core of operative fact with any ground in the initial petition. It is untimely.

3. Ground 11 is unexhausted

Holden did not raise this claim either in his direct appeal or in his post-conviction habeas corpus appeal. See ECF No. 93-4, 93-5. Although the post-conviction appeal brief contained multiple claims of ineffective assistance of counsel, none of them concerned the decision not to testify. Those facts are not related to any exhausted claim of ineffective assistance of counsel, and thus Ground 11 is unexhausted. See Moorman v. Schriro, 426 F.3d at 1056.

E. Ground 12

Ground 12 is a claim of cumulative error.

1. Ground 12 is untimely

The initial petition does not contain a claim of cumulative error. Consequently, ground 12 does not relate back to the initial petition, and it is untimely.

2. Ground 12 is unexhausted

Holden argues that he need not exhaust a cumulative-error claim. ECF No. 88 at 69-70. He is incorrect. The Ninth Circuit has affirmed the decision of a district court that a cumulative-error claim must be exhausted before the district court may consider it. Wooten v. Kirkland, 540 F.3d 1019, 1026 (9th Cir. 2008); Solis v. Garcia, 219 F.3d 922, 930 (9th Cir. 2000). "Briefing a number of isolated errors that turn out to be insufficient to warrant reversal does not automatically require the court to consider whether the cumulative effect of the alleged errors prejudiced the petitioner." Wooten, 540 U.S. at 1025. Holden did not present a cumulative-error claim to the Nevada Supreme Court either on direct appeal or on post-conviction appeal. See ECF No. 93-4, 93-5. Ground 12 is unexhausted.

1 **F. Holden must decide what to do with the unexhausted ground 2(D)**

2 The court will dismiss most of the unexhausted grounds because they also are untimely.
 3 However, ground 2(D) is unexhausted, but respondents did not argue that it was untimely.
 4 Ground 2(D) makes the second amended petition a mixed petition, containing both claims
 5 exhausted in state court and claims not exhausted in state court, and thus the second amended
 6 petition is subject to dismissal. See Rose v. Lundy, 455 U.S. 509, 521-22 (1982); Szeto v.
 7 Rushen, 709 F.2d 1340, 1341 (9th Cir. 1983). Holden may voluntarily dismiss the unexhausted
 8 ground 2(D) and proceed with the remaining grounds, he may voluntarily dismiss this action
 9 without prejudice while he returns to state court to exhaust ground 2(D), or he may move to stay
 10 this action while he returns to state court to exhaust ground 2(D). If Holden chooses the second
 11 option, the court makes no assurances about any possible state-law procedural bars or the
 12 timeliness of a subsequently filed federal habeas corpus petition. If Holden chooses the last
 13 option, he must show that he has "good cause for his failure to exhaust, his unexhausted claims
 14 are potentially meritorious, and there is no indication that the petitioner engaged in intentionally
 15 dilatory litigation tactics." Rhines v. Weber, 544 U.S. 269, 278 (2005). If Holden chooses the
 16 last option, he also will need to designate an alternative choice in case the court declines to stay
 17 the action. Otherwise, the court will dismiss the action.

18 **V. Conclusion**

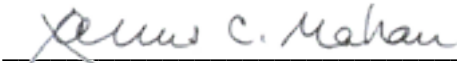
19 IT THEREFORE IS ORDERED that respondents' motion to dismiss (ECF No. 90) is
 20 **GRANTED**. Grounds 1, 2(B), 11, and 12 are **DISMISSED** because they are untimely. Ground
 21 2(D) is unexhausted.

22 IT FURTHER IS ORDERED that petitioner will have thirty (30) days from the date of
 23 entry of this order to do one of the following: (1) inform this court in a sworn declaration that he
 24 wishes to dismiss ground 2(D) of his second amended petition (ECF No. 8), and proceed only on
 25 the remaining grounds for relief, (2) inform this court in a sworn declaration that he wishes to
 26 dismiss his second amended petition (ECF No. 88) to return to state court to exhaust his state
 27 remedies with respect to the claims set out in ground 2(D), or (3) move to stay this action while
 28 he returns to state court to exhaust his state remedies with respect to the claim set out in ground

1 2(D) of his second amended petition (ECF No. 88). Failure to comply will result in the dismissal
2 of this action.

3 IT FURTHER IS ORDERED that if petitioner elects to dismiss ground 2(D) of his second
4 amended petition (ECF No. 88) and proceed on the remaining grounds, respondents must file and
5 serve an answer, which must comply with Rule 5 of the Rules Governing Section 2254 Cases in
6 the United States District Courts, within forty-five (45) days after petitioner serves his declaration
7 dismissing those grounds. Petitioner will have forty-five (45) days from the date on which the
8 answer is served to file and serve a reply.

9 DATED: May 11, 2020.

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11 JAMES C. MAHAN
12 United States District Judge
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